

**ELEVENTH CIRCUIT**

**PATTERN JURY INSTRUCTIONS**

**(CIVIL CASES)**

**2005**

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**1.9.1**  
**Employee Claim Against Employer And Union**  
**(Vaca v. Sipes)**

In this case the Plaintiff makes two claims. The first claim is that the Plaintiff was discharged by the employer without just cause in violation of the collective bargaining agreement governing the terms and conditions of the Plaintiff's employment. The second claim is that the Union breached its duty to fairly represent the Plaintiff, as one of its members, in failing to investigate or otherwise process the Plaintiff's grievance against the employer under the grievance procedure set forth in the collective bargaining agreement.

Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless "just cause" exists for the employee's dismissal. The term "just cause" means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

On the first claim, therefore, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was discharged from employment by the employer; and

Second: That such discharge was without "just cause."

If you find in favor of the Plaintiff on this first claim, you must then consider the second claim, namely, that the Union breached its duty of "fair representation," that is, to represent fairly the Plaintiff as one of its members.

With regard to that claim you are instructed that a union does have a legal duty to represent fairly the interest of its members in protecting their rights under a collective bargaining agreement.

However, an individual employee does not have an absolute right to require the union to pursue a grievance against the employer. The test is basic fairness. So long as the union acts in good faith, the law permits a union to exercise broad discretion in determining whether a particular employee's grievance should be pursued against the employer under the collective bargaining agreement. The union may consider, for example, the cost of the proceeding weighed against its assessment of the likelihood of success if the grievance is pursued. So, even if an employee's grievance has merit, mere negligence or the exercise of poor judgment on the part of the union does not, in and of

itself, constitute a breach of its duty of fair representation. On the other hand, when a union acts arbitrarily or capriciously, or in bad faith and dishonestly, in refusing to process a meritorious grievance, it violates the duty it has to represent fairly the union member who lodged the grievance.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

If you find for the Plaintiff on either of (his) (her) claims, you must then consider the issue of damages. The amount of your verdict should be a sum that you find will justly compensate the Plaintiff for the damages the Plaintiff has incurred. The measure of such damages, if any, is the amount that the Plaintiff would have earned from employment with the employer if the discharge had not occurred, reduced by any earnings that the Plaintiff had, or could have reasonably had, from other employment. In other words, the Plaintiff has a duty to mitigate or minimize the damages and the Defendants are not responsible for lost earnings to the extent that such loss could have been avoided had the Plaintiff used reasonable care in seeking other employment to avoid or minimize the injury.

Once you have arrived at a figure for these lost wages or damages, if you have found for the Plaintiff and against both the employer and the union, you will then have the task of apportioning those damages between the employer and the union. In making the apportionment you should follow this guideline. The employer is liable for lost wages due solely to its breach of the collective bargaining agreement in discharging the Plaintiff. However, any increases in lost wages caused by the union's failure to process the Plaintiff's grievance should be charged to the union and not to the employer. Thus, if you find that the Plaintiff would have been reimbursed for lost wages and/or would have been reinstated to the job the Plaintiff held with the employer but for the breach by the union of its duty to fairly represent the Plaintiff, then you must apportion those lost wages between the Defendants according to the extent to which the union's breach of duty to fairly represent caused increases to the wages lost by the Plaintiff.

**1.9.1**

**Employee Claim Against Employer And Union  
(Vaca v. Sipes)**

**SPECIAL INTERROGATORIES  
TO THE JURY**

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**Do you find from a preponderance of the evidence:**



1. That the Plaintiff was discharged from employment by the Defendant?

Answer Yes or No \_\_\_\_\_

2. That such discharge was without "just cause" (as defined in the Court's instructions)?

Answer Yes or No \_\_\_\_\_

[Note: If you answered No to either of the preceding questions you need not answer any of the remaining questions.]

3. That the Union breached its duty of fair representation owed to the Plaintiff as one of its members?

Answer Yes or No \_\_\_\_\_

4. That the Plaintiff should be awarded \$\_\_\_\_\_ as the Plaintiff's damages.

[Note: Answer Question 5 only if you answered Yes to both Question 2 and Question 3.]

5. That the Plaintiff's damages should be apportioned between the Defendants, \_\_\_\_\_% against the Defendant \_\_\_\_\_, and \_\_\_\_\_% against the Defendant Union.

SO SAY WE ALL.

\_\_\_\_\_  
Foreperson

DATED: \_\_\_\_\_

### **ANNOTATIONS AND COMMENTS**

This jury instruction applies when an employee or former employee files a hybrid breach of contract - breach of duty of fair representation suit against the employer and union. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). A Plaintiff may decide to sue one Defendant and not the other, but must prove the same case whether the suit is against one Defendant or both. Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S.Ct. 1339, 1344, 108 L.Ed.2d 519 (1990) (explaining that most collective bargaining agreements accord finality to grievance procedures established by the agreement).

In deciding whether to prosecute a grievance, the union may consider tactical and strategic factors such as its limited resources and consequent need to establish priorities, as well as its desire to maintain harmonious relations among the workers and between the workers and the employer. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7<sup>th</sup> Cir. (1997)).

A union's actions are arbitrary only if, in light of the circumstances, its behavior is so far outside a "wide range of reasonableness" as to be irrational. Air Line Pilots Assn. Int'l. v. O'Neill, 499 U.S. 65, 67, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991). Bad faith on the part of the union requires a showing of fraud, deceitful action, or dishonest action. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10<sup>th</sup> Cir. 1992) (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d 473 (1971)). Personal hostility is not enough to establish unfair representation if the representation was adequate and there is no evidence that the personal hostility tainted the union's actions. VanDerVeer v. United Parcel Serv., Inc., 25 F.3d 403, 405 (6<sup>th</sup> Cir. 1994). A union owes the duty of fair representation only to members of its collective bargaining unit. Spenlau v. CSX Transp., Inc., 279 F.3d 1313, 1315-16 (11<sup>th</sup> Cir. 2002).

The limitations period for bringing a hybrid breach of contract - - breach of the duty of fair representation claim is six months from the date of the employer or union's final action, whichever is later. Coppage v. U. S. Postal Serv., 281 F.3d 1200, 1204 (11<sup>th</sup> Cir. 2002) (citing DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 169-71 103 S.Ct. 2281, 2293-94, 76 L.Ed.2d 476 (1983)).

Generally, damages are apportioned between the employer and union according to the damage caused by each. However, joint and several liability may be appropriate where the employer and union actively participated in each other's breach. Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1145-46 (2d Cir. 1994); Aguinaga v. United Food & Com. Workers Int'l Union, 993 F.2d 1463, 1474-75 (10<sup>th</sup> Cir. 1993).

## **FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS – CIVIL**

**2006**

**Prepared by the Committee on Pattern Jury Instructions  
District Judges Association - Fifth Circuit  
Judge Martin C. Feldman, Chairman**

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Court's Instruction No. \_\_\_\_  
11.3

### 11.3 EMPLOYEE'S CLAIM AGAINST EMPLOYER AND UNION

The plaintiff makes two claims. The plaintiff first claims that his employer discharged him without just cause in violation of the collective bargaining agreement that governs the terms and conditions of the plaintiff's employment. The plaintiff's second claim is that the union breached its duty to fairly represent him as one of its members. Specifically, the plaintiff claims that the union failed to investigate [or otherwise process] the plaintiff's grievance against his employer under the grievance procedure provided by the collective bargaining agreement.

[As to the first claim, you are instructed that an employer may only discharge an employee governed by a collective bargaining agreement if there is just cause for the employee's dismissal. Just cause means a real cause or basis for dismissal and not an arbitrary whim. A just cause is a cause that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.]

To win on his first claim, the plaintiff must prove both of the following by a preponderance of the evidence:

1. That his employer discharged him from his employment, and
2. That the discharge was without just cause.

If you find for the plaintiff on the first claim, you must then consider the second claim.

A union has a duty under the law to fairly represent the interests of its members in protecting their rights under a collective bargaining agreement. As to the plaintiff's second claim, the plaintiff must prove by a preponderance of the evidence that the union breached its duty to fairly represent the plaintiff's interests under the collective bargaining agreement.

However, an individual employee does not have an absolute right to require his union to pursue a grievance against his employer. A union has considerable discretion in controlling the grievance and arbitration procedure. The question is not whether the employee is satisfied with the union representation or whether that representation was perfect.

The test is basic fairness. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee's grievance against the employer. Even if an employee's grievance has merit, the union's mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation. But where a union acts in bad faith and with hostility, discrimination or arbitrariness fails to process a meritorious grievance, the union violates its duty to fairly represent the union member who has made the grievance.

### DAMAGES

The amount of your verdict should be a sum that you find fairly compensates the plaintiff for the damages he has incurred. The measure of damages to which the plaintiff is entitled, if any, is the amount which the plaintiff would have earned from his employment with the employer if he had not been discharged. You must reduce this amount by any earnings that the plaintiff earned, or reasonably could have earned, from other employment. [The plaintiff has the duty to mitigate or minimize his damage. The defendants are not responsible for lost earnings that the plaintiff could have avoided if he had used reasonable care in seeking other employment to avoid or minimize the injury.]

Once you have arrived at a figure for lost wages or damages, you must apportion those damages between the employer and the union. In making the apportionment, you should follow this guideline. The employer is liable for lost wages due solely to its breach of the collective bargaining agreement in discharging the plaintiff. The union

is responsible for any increases in lost wages caused by its failure to process the plaintiff's grievance.



Office of the Circuit Executive

## Ninth Circuit Model Civil Jury Instructions

### INTRODUCTION

This Manual of Model Civil Jury Instructions ("Manual") has been prepared to help judges communicate effectively with juries.

The instructions in this manual are models. They must be reviewed carefully before use in a particular case. They are not a substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries. *See McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997).

The Jury Instructions Committee considers suggestions from judges, staff and practitioners about possible revisions, additions and deletions. After careful assessment and research, many of these suggestions are adopted. Revisions are available online. They are later compiled and published in the printed version of the Manual. The committee strongly encourages users of this book to make suggestions for further revisions and updates. A suggestion form has been included in the back of this book for that purpose.

The Manual is periodically reprinted. Publication of any edition of the Manual necessarily presents a snap-shot of an ongoing research and drafting process. Accordingly, even the most recently dated edition of the Manual does not guarantee that one is using instructions that are up to date. All instructions in this edition are coded to indicate the year they were last approved by the Committee. The code appears at the bottom of the page upon which an instruction appears (e.g. "Approved 2006"). Users of the Manual should check the date to determine when an instruction was last approved. The entire publication and any later changes can be found under the "Publications" area of the Ninth Circuit's website at <http://www.ce9.uscourts.gov>. This edition is current as to instructions approved in September 2006.

This edition contains a substantial revision and reorganization of many chapters. For example, former Chapters 1-5 have been reorganized as three chapters: Chapter 1 ("Instructions on the Trial Process"), Chapter 2 ("Instructions on Types of Evidence"), and Chapter 3 ("Instructions on Deliberations"). Chapter 9 ("Civil Rights Actions—42 U.S.C. § 1983") and Chapter 10 ("Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation") have been substantially revised and expanded. To assist users, the committee has included a table listing the old instruction numbers in the 2001 edition and the corresponding numbers in the 2007 edition.

These model instructions have been reviewed by various members of the federal bench and bar. The committee extends its thanks to those who reviewed and commented on various parts of the book. The committee also extends its thanks to Ninth Circuit Office of the Circuit Executive staff members Robin Donoghue and Debra Landis. In addition, the committee acknowledges with gratitude the singular contributions of Joseph Franaszek, Esq. For many years, Mr. Franaszek has worked with the committee on a voluntary basis, providing careful research and drafting assistance, as well as a unique "institutional memory" that enables the shifting members of the committee to understand how existing instructions came to be formulated. Mr. Franaszek has performed an invaluable service to the Ninth Circuit and the Bar and has earned the committee's enduring respect.

CAVEAT



These model-jury instructions are written and organized by district judges and magistrate judges who are appointed to the Ninth Circuit Jury Instructions Committee by the Chief Circuit Judge. The judges on the Ninth Circuit Court of Appeals do not serve on the committee, however, and they do not participate in the drafting process. The Court of Appeals does not adopt these instructions as definitive. Indeed, occasionally the correctness of a given instruction may be the subject of a Ninth Circuit opinion.

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## **Ninth Circuit Model Civil Jury Instructions**

### **13.1 EMPLOYEE CLAIM AGAINST UNION AND/OR EMPLOYER—LABOR MANAGEMENT RELATIONS ACT (LMRA) § 301 (29 U.S.C. § 185)**

In order to prevail, the plaintiff must prove each of the following by a preponderance of the evidence:

1. that the plaintiff was discharged from employment by the employer;
2. that such discharge was without “just cause”; and
3. that the union breached its duty to fairly represent the plaintiff’s interests under the collective bargaining agreement.

The plaintiff must prove all three of the above whether [he] [she] is suing the union, the employer, or both. In this case, the plaintiff is suing [[the union] [the employer] [both the union and the employer]].

If you find that the plaintiff has proved each of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless “just cause” exists for the employee’s dismissal. The term “just cause” means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

A union has a duty under the law to represent fairly the interests of its members in protecting their rights under a collective bargaining agreement. However, an individual employee does not have an absolute right to require the employee’s union to pursue a grievance against the employer. A union has considerable discretion in controlling the grievance and arbitration procedure. The question is not whether the employee is satisfied with the union representation or whether that representation was perfect.

Breach of the duty of fair representation occurs only where a union acting in bad faith or in an arbitrary or discriminatory manner fails to process a meritorious grievance. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee’s grievance against the employer. Even if an employee’s grievance has merit, the union’s mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation.

#### **Comment**

This jury instruction applies when an employee or former employee files a suit against either the union or employer. It also applies in a hybrid suit against the employer and union. A plaintiff may decide to

sue one defendant and not the other, but must prove the same case whether the suit is against one defendant or both. *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (explaining that most collective bargaining agreements accord finality to grievance procedures established by the agreement).

To support a breach of the duty of fair representation claim, the plaintiff must prove that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty to act honestly and in good faith and to avoid arbitrary conduct. *Id.* at 563; *see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (union is always subject to complete good faith and honesty of purpose in the exercise of its discretion); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

A union is not liable for merely negligent conduct. *See United States Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73 (1990); *Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir.2000). Breach of the duty of fair representation occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. *See id.* For example, "[a] union breaches its [duty of fair representation] if it ignores a meritorious grievance or processes it in a perfunctory manner." *Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (citing *Vaca*, 386 U.S. at 191).

A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be 'irrational.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). *See also Conkle*, 73 F.3d at 915-16 (holding that a union's decision is arbitrary if it lacks a rational basis); *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985) (holding that reckless disregard may constitute arbitrary conduct); *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982) (defining arbitrary as the "egregious disregard for the right of union members").

To establish that a union acted in "bad faith," a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct," *Humphrey v. Moore*, 375 U.S. 335, 348 (1964), or evidence that the union was motivated by personal animus toward the plaintiff. *See Conkle*, 73 F.3d at 916 (including personal animus as basis for finding of bad faith).

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